Citation: *R. v. Corporal T.D. Ennover*, 2004cm3011

Docket: 200433

STANDING COURT MARTIAL
CANADA
ONTARIO
CANADIAN FORCES BASE KINGSTON

Date:6 May 2004

PRESIDING:COMMANDER P.J. LAMONT, M.J.

HER MAJESTY THE QUEEN
v.
CORPORAL T.D. ENNOVER
(Accused)

FINDING
(Rendered verbally)

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[1] Corporal Ennover, this court finds you guilty of assault causing bodily harm as charged.

[2] The accused, Corporal Ennover, is charged with one charge of assault causing bodily harm upon Private Neron-Bilodeau on 11 June 2003. On that date the accused and Private Neron-Bilodeau were watching a film, along with other service members from their platoon, in the common-room of a barrack block at Canadian Forces Base Borden. A dispute arose between the two of them as to the use of a chair that was brought to the common room by Private Neron-Bilodeau but occupied by the accused after Private Neron-Bilodeau left for a period of time.

[3] Once the film concluded Private Neron-Bilodeau returned to his room on the second floor of the building taking the chair with him. While at the door to his room he was approached by the accused. A short while later the accused struck Private Neron-Bilodeau in the mouth area with his elbow. This cause Private Neron-Bilodeau to bleed heavily, and he was transported to hospital where he received 14 stitches.

[4] The prosecution at court martial, as in any criminal prosecution in a Canadian court, assumes the burden to prove the guilt of the accused beyond a reasonable doubt. In a legal context this is a term of art with an accepted meaning. If the evidence fails to

establish the guilt of the accused beyond a reasonable doubt, the accused must be found not guilty of the offence. That burden of proof rests upon the prosecution and it never shifts. There is no burden upon the accused to establish his or her innocence. Indeed, the accused is presumed to be innocent at all stages of a prosecution unless and until the prosecution establishes, by evidence that the court accepts, the guilt of the accused beyond a reasonable doubt.

[5] Reasonable doubt does not mean absolute certainty, but it is not sufficient if the evidence leads only to a finding of probable guilt. If the court is only satisfied that the accused is more likely guilty that not guilty, that is insufficient to find guilt beyond a reasonable doubt and the accused must therefore be found not guilty. Indeed, the standard of "beyond a reasonable doubt" is much closer to absolute certainty than it is to a standard of "probable guilt".

[6] But reasonable doubt is not a frivolous or imaginary doubt. It is not something based on sympathy or prejudice. It is a doubt based on reason and common sense that arises from the evidence, or the lack of evidence.

[7] The burden of proof beyond a reasonable doubt applies to each of the elements of the offence charged. In other words, if the evidence fails to establish each element of the offence charged beyond a reasonable doubt, the accused is to be found not guilty.

[8] The rule of reasonable doubt also applies to the credibility of witnesses in a case, such as this case, where the evidence discloses different versions of the important facts that bear directly upon the issues. Arriving at conclusions as to what happened is not a process of preferring one version given by one witness over the version given by another. The court may accept all of what a witness says as the truth, or none of what a witness says. Or, the court may accept parts of the evidence of a witness as truthful and accurate.

[9] If the evidence given by the accused, or by other witnesses in support of a defence, as to the important aspects of the case, is accepted, it follows that he is not guilty of the offence. But even if that evidence is not accepted, if the court is left with a reasonable doubt he is to be found not guilty. Even if the evidence of the accused, or of other witnesses in support of a defence, does not leave the court with a reasonable doubt, the court must look at all the evidence it does accept as credible and reliable to determine whether the guilt of the accused is established beyond a reasonable doubt.

[10] There are several elements to the offence of assault causing bodily harm that the prosecution must establish beyond a reasonable doubt before the accused could be found guilty. In this case many of those elements are conceded by the defence to have been established and there is no issue as to those matters. The defence has conceded that the identity of the accused is not an issue. The date and place of the offence as alleged in the

particulars, that is 11 June 2003 at the Canadian Forces Base Borden, is also established in the evidence and there is no issue here.

[11] The defence has also conceded that the evidence establishes the intentional application of force by the accused upon the person of Private Neron-Bilodeau without the consent of Private Neron-Bilodeau. Consent may not be an issue if the court is satisfied that the assault occasioned bodily harm, but in any case there is no issue as to lack of consent in this case.

[12] The remaining elements for consideration are two: knowledge on the part of the accused that Private Neron-Bilodeau did not consent to the application of force, and whether bodily harm was caused by the application of the force.

[13] Having regard for the speed with which the accused struck Private Neron-Bilodeau, and the nature of the injury occasioned by the blow I have no hesitation in concluding that the accused knew that Private Neron-Bilodeau did not consent to being struck.

[14] Bodily harm is a defined expression in section 2 of the *Criminal Code*. It means any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature. I accept the evidence of Private Neron-Bilodeau that the blow to his mouth resulted in heavy bleeding that required stitches to close the wound and caused a scar on the lip that was easily visible to the court. He suffered swelling inside the mouth and a tooth became loose for a period of months. In my view the evidence establishes the element of bodily harm. Defence Counsel concedes that this element is established.

[15] The accused relies upon the defence of self-defence. Subsection 34(1) of the *Criminal Code* provides as follows:

"Everyone who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself."

[16] On the facts of this case, as I find them, the residual self-defence provision in section 37 of the *Criminal Code* is of no more advantage to the accused than subsection 34(1).

[17] If the evidence of self-defence is sufficient to give the defence an air of reality, the prosecution bears the burden of disproving the defence beyond a reasonable doubt. In my view there is sufficient evidence before this court to give the defence of self-defence an air of reality. Accordingly, I consider the elements of the defence of self-defence.

[18] There are four elements of the defence of self-defence. In the first place, there must be some evidence that the accused was assaulted by Private Neron-Bilodeau. Section 265(1) of the *Criminal Code* defines assault as follows:

"A person commits assault when

(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly; or

(b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe upon reasonable grounds that he has present ability to effect his purpose ..."

[19] Both definitions of assault given above may apply on the evidence in this case. The complainant, Private Neron-Bilodeau, gave evidence that the accused pointed his finger in the face of Private Neron-Bilodeau, and Private Neron-Bilodeau brushed away the finger of the accused from the area of his face with his hand. He did not consider that he used any violence to move the finger of the accused, and he characterized the degree of force he used as perhaps a 3 on a scale of 10. But in law a mere touching may amount to an assault even if not accompanied by any violence. Private Lachance gave evidence that the complainant Private Neron-Bilodeau pushed the accused on his shoulder. This would also constitute an assault upon the accused for purposes of the defence of self-defence.

[20] The accused did not confirm the evidence of either Private Neron-Bilodeau or Private Lachance on these points, but did give evidence of a gesture by the complainant of raising his arm which caused the accused to react in the way he did by striking the complainant in the mouth area with his elbow. An assault includes an attempt or threat to apply force. Even if the accused were mistaken as to the purpose of the complainant in raising his arm, if his belief that an assault is in progress or imminent is reasonable, self-defence is available as a defence.

[21] The second element of the defence is that the accused must not have provoked the assault. Provocation may be by blows, words or gestures that are intended to provoke an assault. In my view, the evidence does not establish beyond a reasonable doubt provocation by the accused, and accordingly this element of the defence of self-defence is established.

[22] The third element is that the accused must not have intended to cause death or serious bodily harm. This involves an inquiry into the mental state of the accused at the time he is said to have acted in self-defence. In my view the evidence does not establish beyond a reasonable doubt that the accused intended by his actions to cause death or serious bodily harm, and accordingly this element of the defence is established.

[23] The fourth element is proportionality, that is, the force used by the accused must be no more than is necessary to enable him to defend himself. That does not necessarily mean the force that, in the mind of the accused, is necessary to subdue his attacker. It means only the amount of force necessary to avoid the perpetration or continuation of an assault upon him. This does not mean that the accused must retreat from the aggression towards him. But his failure to take other courses of action that are open to him may support an inference that the accused was not acting in self-defence but merely wanted to fight.

[24] In this connection the relationship between the violence of the attack on the accused and the force of the accused's response need only be one of rough proportionality. The accused need not measure with precision the amount of force that is necessary. If the accused honestly believed on reasonable grounds that the force he used was necessary the defence of self-defence applies to justify his actions. If, on the other hand, the accused is reckless as to the amount of force that is necessary to defend himself, the defence of self-defence is not available. The injury that may have resulted from the use of force is not determinative of the reasonableness of the force used.

[25] Private Neron-Bilodeau testified that he had a verbal dispute with the accused who was occupying the chair that he had brought from his room to watch the film. He was upset that the accused refused to give up the chair but sat on the floor when instructed to do so. He proceeded to offer insulting remarks to the accused in French and English. After the film finished he collected the chair to return to his room on the second floor. At the door to his room the accused approached him and spoke to him in English pointing his finger in his face. Private Neron-Bilodeau explained that the chair was from his own room. He used his hand to remove the finger of the accused from the area of his face. At that point he was struck and fell to the floor losing consciousness for a short period. When he regained consciousness he was on the floor in pain and confused and there was blood everywhere. He was taken to hospital and the wound to his upper lip was sutured. He denied using any threatening words or gestures towards the accused.

[26] I accept the evidence of Private Neron-Bilodeau that he had no intention of fighting with the accused and did not threaten the accused with words or gestures.

[27] Ordinary Seaman Carignan occupied the room across from Private Neron-Bilodeau. He did not see him struck by the accused but heard a commotion and emerged from his room to see Private Neron-Bilodeau down on one knee holding his face and bleeding profusely. He asked the accused why he struck Private Neron-Bilodeau, and the accused replied that it was because they called him an idiot. Later the accused apologized and said to Carignan that it was his policy when people call him names to do what he did.

[28] Corporal Ennover gave evidence. He stated that after he refused to give up the chair to Private Neron-Bilodeau he was called derogatory names by French-speaking members of the platoon seated near him. After the film was finished he remained to clean up and then returned to his room on the second floor of the barrack block. He saw Private Neron-Bilodeau in front of the door to Private Neron-Bilodeau's room and engaged him in conversation to clarify who the chair belonged to. Private Neron-Bilodeau confirmed the chair was his and Corporal Ennover apologized. Private Neron-Bilodeau used insulting language toward Corporal Ennover. Corporal Ennover testified that he thought Private Neron-Bilodeau was going to touch him so he brought up his elbow and Private Neron-Bilodeau was on the ground. He perceived the action of Private Neron-Bilodeau as aggressive and he therefore intended to subdue Private Neron-Bilodeau. He struck in self-defence. He intended to prevent Private Neron-Bilodeau from doing "whatever he was going to do".

[29] In cross-examination Corporal Ennover agreed that he was not physically threatened by Private Neron-Bilodeau at any time. He later contradicted this evidence claiming that he was indeed threatened by Private Neron-Bilodeau. He was then cross-examined on statements he made to the police investigator in which he appears to state that he did not feel threatened, although there are many passages in the lengthy statement in which he clearly states he did feel threatened. I find the evidence of the accused as to whether he felt threatened by Private Neron-Bilodeau to be entirely inconsistent and unreliable.

[30] Corporal Ennover testified that he was in the course of leaving the area of Private Neron-Bilodeau when he called Corporal Ennover an imbecile. Corporal Ennover then asked "Did you call me an imbecile?" He saw Private Neron-Bilodeau lifting his arm in what he interpreted as a motion by Private Neron-Bilodeau to attack, and he snapped. He blocked the effort of Private Neron-Bilodeau and countered with his elbow to the mouth area of Private Neron-Bilodeau because that is what he usually does.

[31] Corporal Ennover has a vague recollection of a conversation with Ordinary Seaman Carignan but denies speaking to him about the incident.

[32] I accept the evidence of Ordinary Seaman Carignan as to his conversations with the accused. I find as a fact that the accused apologized to Ordinary Seaman Carignan for striking Private Neron-Bilodeau, and he struck him in retaliation for being called names. I find that Private Neron-Bilodeau did indeed brush away the accused's hand from the area of his face, but this action was not violent and did not constitute a threatening gesture towards the accused. It was unreasonable for the accused to have concluded otherwise.

[33] Private Lachance testified that he was present at the showing of the film and heard French-speaking members calling the accused names. On the second floor he saw Private Neron-Bilodeau pushing the accused on his right shoulder to push him away, and at that moment the accused struck Private Neron-Bilodeau with his elbow in the face. He, Private Lachance, considered that the action of the accused was a reflex reaction and the force used was intended to defend and not to attack. I accept that Private Lachance had a good opportunity to observe the event. I do not accept his evidence that Private Neron-Bilodeau pushed Corporal Ennover on his shoulder. Neither Private Neron-Bilodeau nor Corporal Ennover confirm this part of the evidence of Private Lachance. In any event, I do not accept Private Lachance's characterization of the retaliatory blow by the accused as done in self-defence. Private Lachance did not testify as to any action of Private Neron-Bilodeau that he considered constituted a threat to the accused. His conclusion is not consistent with the evidence of the accused who did not testify that his response was simply a reflex. Rather, the accused considered that his response was intended by him to subdue his opponent.

[34] I do not accept the theory of the defence that the French-speaking members wanted to get even with the accused for his behaviour over the use of the chair. There is no evidence that Private Neron-Bilodeau was acting in concert with anyone else to constitute a threat to the accused.

[3] In my view the evidence as a whole establishes that the blow delivered by the accused was wholly out of proportion to any threat posed to the accused by Private Neron-Bilodeau. It was not necessary for the accused to strike him in the manner he did in order to defend himself from Private Neron-Bilodeau. I find that the accused did not honestly believe that the amount of force he used was necessary to defend himself. He himself was surprised at the severity of the blow he inflicted upon Private Neron-Bilodeau. I am so satisfied beyond a reasonable doubt, and accordingly the defence of self-defence fails, and the accused is guilty as charged.

COMMANDER P.J. LAMONT, M.J.

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